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CHARLES ELMORE GROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945.

No. 1213.

ANNIE MOORE, as administratrix of the goods, chattels and
credits of WILLIAM J. SIMPSON, deceased,

Petitioner,

against

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Circuit
Court of Appeals for the Second Circuit, and Brief in
Support of Petition.

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POINT I. This case should have been decided in accordance with the law of the State of New York and the burden is placed upon this Court to determine how the Court of Appeals of the State would have ruled on the proposition here presented

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POINT II. Where a conflict of law was involved in a case where a suit was decided by the highest court of North Carolina in an action to recover for death occurring in another State, the highest court of North Carolina construed the statutory limitation of the foreign State, not as a condition precedent but as a mere statute of limitation and applied the North Carolina statutory limitation the law of the forum

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POINT III. Had the motion to dismiss been made in the case at bar while the action was pending in the State of New York, it is submitted that the Courts of such State, following the public policy of that State, and in view of the North Carolina decision in <i>Tiffenbraun vs. Flannery</i> , 198 N. C. 397, would have applied the law of the forum holding under the facts of this case the North Carolina statute to be merely one of limitation and not a condition precedent and applied the New York State two-year limitation and would have denied the motion to dismiss	21
IV. CONCLUSION. It is respectfully submitted that this petition for a writ of certiorari should be granted	27

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IN THE
Supreme Court of the United States
OCTOBER TERM.

ANNIE MOORE, as administratrix of the
goods, chattels and credits of William
J. Simpson, deceased, Petitioner,
against
ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

TO THE HON. CHIEF JUSTICE AND THE ASSOCIATED JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Annie Moore, as administratrix of the goods, chattels and credits of William J. Simpson, deceased, by her attorneys, William F. Stanton, Henry Hirschberg and J. R. Thompson, the said William F. Stanton being duly admitted to practice in the Supreme Court of the United States, prays that a writ of certiorari issue to review the judgment and order of the United States Circuit Court of Appeals in and for the Second Circuit entered in the above case on the 21st day of February, 1946, affirming a judgment herein of the United States District Court in and for the Southern District of New York dismissing the complaint herein on the law and on the merits and with prejudice.

Opinions Below.

The opinion of the District Court is set forth in the record at pages 29 to 31 inclusive and is not officially reported.

The opinion of the Circuit Court of Appeals is set forth at pages 34 and 35 of the record and is not officially reported.

The order of the Circuit Court of Appeals affirming the judgment of the District Court appears in the record at page 36.

Jurisdictional Statement.

The order and judgment of the Circuit Court of Appeals was entered in the office of the Clerk of that court February 21st, 1946.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended; Section 347, Vol. 28 U. S. G. A.:

Statement of Law Involved.

The action was brought in the New York Supreme Court, Orange County, to recover damages for the wrongful death of William J. Simpson, which occurred in North Carolina, December 16th, 1943 (39). Letters of administration had been issued to plaintiff by the Surrogate's Court of Orange County, New York State.

The action in the New York Supreme Court was instituted by the service of a summons on the defendant December 23rd, 1944 (39). The complaint was served April 17th, 1945 (2). An order of removal to the United States District Court, Southern District of New York

on the ground of diversity of citizenship was granted by the New York Supreme Court Special Term, Orange County, May 3rd, 1945 (19-23).

Motion to dismiss was made June 1st, 1945, and granted by the United States District Court, Hon. John Bright, Judge, August 30th, 1945 (25-79). Appeal was taken to the Circuit Court of Appeals by plaintiff, October 3rd, 1945 (79-81).

The ground of the order of dismissal was the claim that by the law of North Carolina, where the death of plaintiff's intestate occurred, the statute creating the cause of action specified a period of one year from death within which the action must be brought and that said period of limitation was a condition precedent which had expired prior to the institution of this action.

The defendant claimed that under the North Carolina statute, the highest court of that State, had held in cases where death had occurred outside the State of North Carolina, but the action had been brought within the State of North Carolina, *i. e.*, in cases where there was a conflict of jurisdiction, *that the statutory period described by the North Carolina statute was merely one of limitation and not a condition precedent* (*Tiffenbraun vs. Flannery*, 198 N. C. 397; 151 S. E. 857; 68 L.R.A. 210).

The learned District Judge in a short opinion (85-93) held that the limitation in the North Carolina statute (1943, Chapter 28, Section 173) had been construed as a condition precedent by the highest court of North Carolina and that in his opinion the New York State Courts would have so construed the North Carolina Statute. He did not refer in his opinion to *Tiffenbraun vs. Flannery, supra*, or the cases cited by plaintiff (91-93).

Plaintiff contended that this case pursuant to the doctrine of *Erie Railroad Company vs. Tompkins*, 304 U. S. 64, should be decided in accordance with the law of New York State and that there is persuasive data showing that the public policy and law of New York State and the probable decision of the Courts of that State and of the Court of Appeals, if his action had remained in that State, would have been determined by the law of the forum and that the two-year statute of limitation prescribed in the New York State Death Statute would have been applied, and the limitation in the North Carolina Statute construed as a mere limitation and not a condition precedent in view of the decision of the highest court of that State in *Tiffenbraun vs. Flannery*, 198 N. C. 397, and in view of the public policy of New York State as expressed in Sections 13 and 55 of the New York Civil Practice Act (64-66, 68-69).

The United States Circuit Court of Appeals, Second Circuit, in a short opinion affirming (p. 35 record) held that the *Tiffenbraun* case was not susceptible of the construction claimed by appellant.

Scope of Argument.

The question here presented briefly stated is the following: Would the Courts of New York State and particularly the Court of Appeals of that state under the facts of the case at bar have construed the limitation of the North Carolina Statute as a limitation and not a condition precedent and under the public policy of New York State applied the law of the forum and the two-year New York death limitation to this action?

Appellant's contention is that the Courts of New York State would have applied the law of the forum and the public policy of that state and consequently the

two-year statutory limitation, and that the Court below erred in finding to the contrary.

Statutes Involved.

The statutes involved are general statutes of North Carolina Chapter 28, Section 173, formerly Section 160 C. S.; Section 174 formerly Section 161 C. S., and Section 149 formerly Section 137 C. S., and Section 130 of the Decedent's Estate Law of the State of New York and Chapter 506 of the Laws of 1943 of the State of New York effective April 15th, 1943, now Section 13 of the Civil Practice Act, of that State and Chapter 516 of the Laws of 1943 in effect April 15th, 1943 now Section 55 of the Civil Practice Act of that state. These statutes insofar as applicable are set forth in the appendix.

Reasons for Granting the Writ.

1. The question here presented it is claimed involves a conflict of laws between the public policy of the State of North Carolina and the public policy of the State of New York as exemplified by the statutes and opinions of the highest courts of the respective states; also it is claimed there has been a misconstruction by the Circuit Court of Appeals of the effect upon the Courts of New York State of the decision in *Tiffenbraun vs. Flannery*, 198 N. C. 397-151 S. E. 857; 68 L.R.A. 216.

2. The decision of the Circuit Court of Appeals has reference to an important question of the local law of the State of New York, in which state this action originated, and has been decided in a way probably in conflict with the applicable doctrine of that state, and with the applicable local decisions.

3. The Circuit Court of Appeals has rendered a decision on an important question of Federal Law which it is believed has not been finally settled by this court.

By the public policy of the State of New York, as expressed by the decisions of its highest court, the Court of Appeals, the period prescribed for the bringing of an action to recover damages caused by death contained in the New York Statute has been consistently construed as a period of limitation only and not a condition precedent annexed to the cause of action. The language of the New York Statute prescribing the period of limitation is substantially identical with that of the North Carolina Statute. While it is conceded that in cases arising in North Carolina between citizens of that state, the highest court of North Carolina has construed its period of limitation in its death statute as a condition precedent annexed to the cause of action, it is also claimed that at the same time in the *Tiffenbraun* case it construed the period of limitation of a foreign statute as not a condition annexed to the cause of action and did so in order to favor North Carolina citizens. Under these circumstances it is contended that the highest court of New York State, had this case been permitted to remain in that jurisdiction, would have construed the limitation in the North Carolina statute as not a condition precedent annexed to the cause of action, but as a mere statute of limitation, and that this is shown not only by the decisions of New York Court of Appeals but by the New York statutes referred to here and in the annexed brief.

4. The case is an important one involving as it does a construction of the Federal Courts pursuant to the doctrine of *Erie Railroad Company vs. Tompkins*, 304 U. S. 64, regarding the statutes and public policy of the State of New York.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court to review the decision of the Court below.

Dated, April , 1946.

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